

Acquisition Advisory Panel

Cross-Cutting Issues: Small Business Working Group

Revisions to Preliminary Draft Recommendations February 23, 2006

These slides contain preliminary working group findings and recommendations for discussion purposes only. They have not been approved by the Acquisition Advisory Panel

Summary of Proposed Revisions

- Clarify guidance on the order of priority in utilizing small business contracting methods
- Add a previously omitted recommendation concerning cascading procurements
- Revise the proposed amendments authorizing reservations of small business prime contract awards in full and open multiple award procurements
- Clarify the justification for the recommendation concerning the limitations on subcontracting requirements
- Revise the proposed amendment authorizing reservations of small business task orders against multiple award procurements

Finding #1

- **Contracting officers need definitive guidance on the priority for applying the various small business contracting preferences to particular acquisitions**

Recommendation #1

- **Amend the Small Business Act to provide consistent statutory language governing the applicability of the various small business preference programs**

[Recommendation originally adopted on 1/31/06 with request for additional clarifying language in the report. The report has been revised per the next slide. Panel agreed proposed language addresses concerns raised on 1/31/06. No vote required nor taken.]

Revision to Draft Report Under Recommendation #1

- Draft Report includes additional language explaining the important legislative and public policy purposes of the various small business contracting mechanisms and the importance of granting contracting officials flexibility in utilizing these mechanisms to ensure small business contracting goal achievements (See Draft Report at 34-35)

Finding #2

- **Contracting officers need explicit guidance on how to exercise their discretion in selecting the appropriate small business contracting method for a procurement**

Recommendation #2

- **Provide guidance clarifying that contracting officer discretion in selecting small business contracting methods should be based on small business goal achievements and market research**

[Recommendation originally adopted on 1/31/06 but working group agreed to address concern that COs need greater clarification to use the agency goal achievements to guide their discretion. Working group provided this additional revised language (see next two slides) to address this concern. Language adopted by the Panel 2/23/06]

Additional Proposed Amendments Under Recommendation #2

- Provide additional guidance in utilizing small business contracting mechanisms, by amending 48 C.F.R. § 19.201(c) to add the following at the end of paragraph (c):

**** * *In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs. (See Draft Report at 35-36)***

Additional Proposed Amendments Under Recommendation #2 (Con't)

- Redesignate paragraphs (b) through (e) of 13 C.F.R. § 125.2 as paragraphs (c) through (f), and add a new paragraph (b) to read as follows:

In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs. (See Draft Report at 35-36)

Finding #4

- **Cascading procurements fail to balance the Government's interest in quick contracting with the requirement for the maximum practicable small business contracting opportunities**

Recommendation #4

- **Amend governing statutes and regulations to expressly preclude cascading procurements as an acquisition strategy**

[Recommendation originally adopted on 1/31/06. Since, Working Group discovered the need for an additional statutory revision (see next slide) and advised Panel on 2/23/06. All agreed. No vote required nor taken]

Previously Omitted Proposed Amendment Under Recommendation # 4

- Draft Report recommends the repeal of Section 816 of the National Defense Authorization Act for Fiscal Year 2006, Public Law No. 109-163, which authorizes the Department of Defense to use cascading procurements in limited circumstances (See Draft Report at 37-38)

Finding #8

- **The strategy of reserving prime contract awards for small businesses in full and open multiple award procurements may be effective in providing small business prime contracting opportunities**

Recommendation #8

- **Provide express statutory authorization for small business reservations of prime contract awards in full and open multiple award procurements that are not suitable for competition exclusively by small businesses**

[Recommendation originally adopted on 1/31/06 but implementing language sent back to working group for revisions. The working group revised the language (see next slide) for 2/23/06 meeting and Panel adopted revised language 2/23/06]

Revised Proposed Amendment Under Recommendation # 8

- The Draft Report replaces the former proposed paragraphs (C) and (D) with a new proposal to add a revised paragraph (C) to 10 U.S.C. § 2304a(d)(3) and 41 U.S.C. § 253h(d)(3) as follows:

(3) The regulations implementing this subsection shall –

(C) provide discretion to reserve one or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)), when a total set aside is not appropriate.
(See Draft Report at 50-51)

Finding #9

- Contracting officials need guidance on how to apply the limitations on subcontracting requirements to small business prime contract reservations in full and open multiple award vehicles

Recommendation #9

- Provide an amendment to clarify that the limitations on subcontracting provisions do not apply to contracts that are reserved for small businesses in full and open multiple award procurements and to require that SBA conduct a study on whether the limitations on subcontracting is beneficial in today's contracting environment

[Recommendation tabled pending further discussion]

Proposed Amendments Under Recommendation # 9

- Add a new paragraph (4) to 15 U.S.C. § 644(o) to read as follows:

(4) The limitations on subcontracting do not apply to prime contracts that are reserved for small business concerns under full and open multiple award procurements.

Add a new paragraph (k) to 13 C.F.R. § 125.6 as follows:

(k) The limitations on subcontracting do not apply to prime contracts that are reserved for small business concerns under full and open multiple award procurements.

Revision to Draft Report Under Recommendation # 9

- The Draft Report reiterates that SBA's existing affiliation regulations, including the ostensible subcontractor rule, deter small business “fronts” because they prevent businesses that subcontract primary and vital requirements to large businesses from qualifying as small business concerns (See Draft Report at 51)

Revision to Draft Report

Under Recommendation # 9

- Add a new paragraph (4) to 15 U.S.C. § 644(o) to require that SBA's Office of Advocacy conduct a study on the limitations on subcontracting requirements, as follows:

(4) The Office of Advocacy of the Small Business Administration shall conduct a study on the benefits and effectiveness of the contract performance requirements under this section based on conventional industry practices and the current Federal contracting environment. Not later than *[one year from the date of enactment of this amendment]* the Office of Advocacy shall submit a report to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives that contains the results of the study conducted under this paragraph and any proposed changes to the existing contract performance requirements.

Finding #10

- **The contracting community needs explicit guidance on utilizing small business reservations for orders against multiple award IDIQ contracts**

Recommendation #10

- **Provide a statutory and regulatory amendment granting agencies explicit discretion to limit competition for orders to small businesses**

[Recommendation originally adopted on 1/31/06 pending technical revision of language. Panel voted to adopt revised language (see next slide) on 2/23/06.]

Revised Proposed Amendments

Under Recommendation #10

- The Draft Report revises the proposed amendment to 10 U.S.C. § 2304c and 41 U.S.C. § 253j, governing FAR Part 16 IDIQ contracts, to delete the reference to “any other provision of law, including but not limited to” in the proposed paragraph (c) to read as follows:

(c) Notwithstanding paragraph (b) and Section 803 of Pub. Law No. 107-107, 115 Stat. 1012 (2002), a contracting officer has the discretion to set forth procedures in multiple award contracts that provide that competition for particular orders may be limited to small business concerns, including the subgroups identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)). (See Draft Report at 52)

Next Steps

- Post the working group's draft report, including findings and recommendations, on the Panel's web site for public comment